

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1244

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
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Plaintiff-Appellee,
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-against-
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JOSEPH R. PUGIA, SR.,
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Defendant-Appellant.
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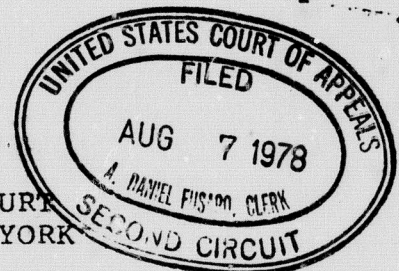
Docket No. 77-1244

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BRIEF FOR APPELLANT

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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK



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UNITED STATES OF AMERICA,

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-against-

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BRIEF FOR APPELLANT
JOSEPH R. PUGIA, SR.,

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the Government failed to prove that appellant Pugia submitted a materially false statement with the intent of influencing the bank to extend a loan.

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Northern District of New York (Munson, J.), entered March 28, 1977 convicting appellant Joseph R. Pugia, Sr. of one count of having knowingly made a false statement on a financial statement submitted to an FDIC insured bank for the purpose of influencing the bank to extend loans, in violation of 18 U.S.C. §1014. The imposition of sentence was suspended, and appellant was placed on two years' probation.

By order of this court dated June 14, 1978, the Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

A. The Charges

Indictment 76 Cr. 89, filed September 22, 1976, charged appellant Joseph R. Pugia, Sr., with three counts of violation of 18 U.S.C. §1014, which prohibits, inter alia, the knowing making of false statements to a federally insured bank for the purpose of influencing the bank to approve a loan. The three counts charged that appellant, in a single financial statement filed with the Bankers Trust Company of Central New York, in Utica, New York, had knowingly listed as assets three separate items which he in fact

did not own, "real estate at 318 William Street, Herkimer, New York," worth \$14,000 (count 1), two lots "located at 605 Maple Grove Avenue, Herkimer, New York" worth \$10,000 (count 2), and a \$26,000 deposit with the American Motors Corporation (count 3).* Trial began on December 7, 1976, in the Northern District of New York, before the Honorable Howard G. Munson.

B. The Financial Statement

The form which was the predicate for the charges against appellant** is a personal financial statement signed by Joseph R. Pugia, Sr., on September 13, 1974. It purports to show his financial condition as of the month before the date of signature, that is August 13, 1974. The front page of the form, one column listing assets, and another listing liabilities, shows appellant with "Real Estate" assets of \$42,000. Also separately listed as an asset, worth \$10,000, are "Two Lots Herkimer." At the top of the form is the notation "\$26,000-- On Deposit With American Motors Corp." a similar figure-- "Deposit with A.M.C.," with a value of \$26,000 is listed in the assets column. The statement shows that appellant, as of August 13, 1974, had total assets of \$91,240, and a net worth of \$63,740.

*The Indictment is set forth as B to the separate appendix to appellant's brief.

**The financial statement, introduced into evidence as Government Exhibit 30, is set forth as D to the separate appendix to appellant's brief.

On the back of the form in the supplementary schedule under "Real Estate," there is the notation "2 Lots 160-80 in Herkimer; 605 Maple Grove Avenue, Herkimer, New York" which lists the property as worth \$10,000; in a supplementary schedule entitled "Mortgages Owned" are listed the following items: "Marine Midland," with a market value of \$28,000 and an owned mortgage of \$9,500; and "318 William St. Herkimer," with a market value of \$14,000 and no owned mortgage. It is based on this last notation that appellant was ultimately convicted.

C. The Government's Explanation

To explain the financial statement and the circumstances surrounding its completion, the Government relied on the testimony of David Frezza, an assistant Vice President of the Bankers Trust Company of Central New York both in charge of installment loans and involved with approving some commercial loans (81-82).^{*} Frezza, an acquaintance of Puglia's for a number of years, had first met him 10 years previously at a time when appellant was an automobile salesman and Frezza was an employee with the installment loan department of the Marine Midland Bank (96, 169-170). In 1973, when Frezza was employed in the commercial loan department of the Utica branch of Marine Midland Bank, appellant came to him and requested, inter alia, business loans for purchasing

^{*}Numerals in parentheses refer to pages of the trial transcript.

automobiles, the inventory of his business, Mutual Auto Sales, Incorporated (175, 181-182). Frezza approved the loans, and eventually, with Frezza's help, Mutual Auto Sales was granted a line of credit permitting loans of up to \$50,000, secured both by a security interest on the autos purchased as a result of the loans, and by appellant's personal guarantee to make good the loans if the corporation defaulted (89, 117, 181-185, 200-201).

Sometime between April and June 1974, Frezza assumed a position at a branch of the Bankers Trust Company located in Utica, New York (184).^{*} In June, appellant, who Frezza knew still had a \$50,000 line of credit at Marine Midland, came to Frezza at Bankers Trust and asked for a \$2,000 loan for the purchase of a car for Mutual Auto Sales, Inc.; Frezza approved the loan (89; G.X.28a). Appellant paid off the loan and continued borrowing small amounts of money from Bankers Trust. At this time, appellant, in order to continue his relationship with Frezza, stated that he was interested in transferring his corporate line of credit account to Bankers Trust. Frezza agreed to consider accepting the account, but allegedly told appellant that in order for appellant to continue borrowing, the bank would require a personal guarantee and a financial statement. According to Frezza,

^{*}Prior to August 13, 1974, the bank was known as Mohawk Valley State Bank. On August 13, Bankers Trust became the successor in interest to Mohawk Valley (84-85).

"I told him the purpose of the financial statement was a necessity for me to have in order to grant him a loan. We had to see he was financially secure in order to be able to repay this loan" (156; see 89-91).

On July 17, 1974, appellant submitted a personal guarantee to the bank; however, no personal financial statement was submitted (see 121-123). Between July and September 1974, appellant continued his line of credit with Marine Midland; meanwhile, the balance due on appellant's indebtedness on the corporate loan account at Bankers Trust fluctuated between \$10,000 and \$15,000 (see G.X.28a). On September 11, 1974, a new loan was added to the account, raising the balance due to \$20,000 (116).

In October, Bankers Trust took over the Marine Midland line of credit, a procedure which enabled the Bankers Trust line of credit to be secured both by appellant's business inventory, unimpaired by the security interest of any other bank, as well as by his personal guarantee (120). By October, the line of credit was established at \$100,000 (89).

On or about September 13, 1974, appellant submitted to Frezza the statement --Government Exhibit 30-- which purported to show his personal financial condition as of August 13, 1974. Despite the submission of the form under appellant's signature, Frezza recalled that before he accepted the form he made a number of additions and changes (134). Thus, at the top of the first page of the form is the notation "\$26,000 - On

Deposit With American Motors Corp." Frezza stated that he was familiar with the deposit and that he had discussed it with appellant but that "writing it on the top of the financial statement does not show on the assets, therefore ... this reduces his net worth" (134-135). Frezza stated that in no way "could we ever consider giving him a line," that the \$26,000 "had to be shown as an asset" (138). Accordingly, Frezza, with appellant's agreement, added this \$26,000 as an asset, a feat which increased appellant's assets and net worth as shown on the form by \$26,000. Frezza crossed out and rewrote the figures (135-136).

Frezza then turned to explain the notation regarding 318 William Street, the basis of the charge upon which appellant was convicted. Frezza noted that the "Mortgages Owned" entry on the assets column in the front of the financial statement states "none;" however, the schedule on the back of the form lists two items. One is entitled only "Marine Midland," with a market value of \$26,000 and an owned mortgage of \$9,500. The second listing is "318 William St., Herkimer," with a listed market value of \$14,000 and no owned mortgage; below the 318 William Street property is the notation that "both homes can be sold for much more." Frezza concluded that these entries "should have been in real estate owned" since their combined market value was \$42,000, the same figure listed as "Real Estate" in the asset column on the front of the statement (141-142). According to Frezza, appellant agreed

that there was a mistake (144). Frezza also told appellant that he did not own a mortgage for Marine Midland, but that Marine Midland owned a mortgage on his house; again, appellant agreed with Frezza's assessment (143). However, despite the inaccuracies in the report, Frezza did not seek alteration of the financial statement as a consequences of the discussion or require appellant to complete a new--and correct--form. Thus, the 318 William Street notation remains in the "Mortgages Owned" schedule with a showing of "None" for mortgages owned.

Finally, Frezza testified that the listing for two lots at 605 Maple Grove Avenue for \$10,000 should have been included as real estate owned rather than as an "other asset" but that "we allowed this to stand in the assets column" (146).

Frezza's allegation that the completed form was significant to the bank in determining whether to grant appellant a loan (see 151, 156) was called into question on cross-examination. Thus, the witness admitted that on September 11, 1974, two days before the statement was prepared, a \$10,000 note was given to Mutual Auto Sales, and that, on the same date, Frezza had approved an unsecured personal promissory note written by appellant for \$27,901 (190-191). Frezza explained the omission of these items, of which he was intimately aware, on the financial statement as a function of the fact that the form was designed to show appellant's financial condition on August 13, 1974, rather than when it was written (194, 200). However, Frezza gave no indication why it was important that the form show a financial condition no longer accurate at the

time it was filled out, or how so inaccurate a form could play a part in the granting of a loan. It is notable, moreover, that the financial statement requires that in the event of an adverse change in the writer's financial condition, the bank is to be notified of the change in writing; here there was no written notation on the form (see G.X.30).

Frezza was also aware that appellant's corporation owed, and that appellant had personally guaranteed, \$50,000 worth of loans extended by Marine Midland to Mutual Auto Sales, Inc. (185, 201); there is no notation of this fact on the financial statement. Frezza testified that he did not consider it necessary for appellant to show this potential liability since, despite appellant's personal guarantee, the Marine Midland account was a corporate account (200).^{*} Frezza did not, however, reconcile this view with the requirement in the financial statement that a signer warrant that he has no "liabilities, direct or contingent, business or accommodation except as set forth in this statement" (G.X.30).

Frezza conceded that had the promissory note and Marine Midland liabilities been added to Puglia's financial statement, they would have shown appellant with a negative net worth. He further noted that he would not have given a loan to someone with a negative net worth (199-200). Nevertheless,

^{*}Despite Frezza's opinion in this matter, in a bankruptcy action subsequently filed by Bankers Trust, the bank claimed that appellant's failure to list the \$50,000 contingent liability constituted a materially false statement. See complaint, Bankers Trust Company of Central New York v. Puglia, N.D.N.Y. No. 76-Bk-167 (March 25, 1976).

he did not include these liabilities in the financial statement (202), nor did he explain why he had granted a completely unsecured \$30,000 personal promissory note just two days before requiring the financial statement. Finally, at no time did Frezza state that he was unaware that appellant's alleged claims with respect to the property at 318 William Street or 605 Maple Grove Avenue were untrue.

To conclude its direct case, the Government produced three witnesses who testified that appellant did not own the three questioned assets. Harry Farber, appellant's father-in-law, testified that he owned land at 605 Maple Grove Avenue in Herkimer, although it was willed to appellant's wife (223-225). Warren Hanscon, an official with the American Motors Corporation, testified that although appellant had applied for an American Motors Corporation franchise, to his knowledge appellant had never placed a deposit (226-229). Beatrice Marcewicz testified that, although appellant and his family had lived as tenants at 318 William Street, Herkimer, New York, from 1965 to 1972, she was the owner of the property (231-235).

D. The Defense Case

The principal defense witness was appellant Joseph R. Pugia, Sr., 40 years old with a 9th grade education, and a friend of Frezza's since 1968 (248-249, 279). Appellant began his business relationship with Frezza in 1971 or 1972 by obtaining small business loans of \$2,500 for his used car lot (251-253). In 1972 and 1973 appellant worked as an

employee at a Ford Dealership. However, he continued his friendship with Frezza, and met with him for lunch about once a week (254). In or about the summer of 1973, appellant started Mutual Auto Sales, a business which involved buying used cars, reconditioning them, and taking them to auction; appellant would take out loans to buy the cars, and would pay them when the cars were resold (255-256, 257-258). Appellant operated without a line of credit until 1974. At that time Frezza informed him that if he wished a line, he should incorporate, and, on March 20, 1974, appellant incorporated and was given a \$25,000 line of credit by Frezza at Marine Midland Bank, a line which eventually increased to \$50,000 (257, 262).

In April or May of 1974, Frezza left Marine Midland Bank to work at Mohawk Valley Bank, which soon became Bankers Trust.* In June and July, when Frezza left Bankers Trust for a short time, appellant borrowed small amounts of money at the bank from a Mr. Clark (264-265, 295). Appellant also gave his personal guarantee for the loans (296). On September 11, 1974, with Frezza again over at Bankers Trust, appellant, who was interested in starting his own auto business, sought and received two loans, a \$10,000 unsecured promissory note written for Mutual Auto Sales, and a \$27,000 personal unsecured promissory note (264-265). That same night Frezza called

*Later, Frezza returned to Marine Midland for a short time, and left again for Mohawk Valley (259).

appellant, saying he was in a "jam" and that appellant should come down to Frezza's office in the morning (266).

The next day at Bankers Trust, Frezza explained that he had a "big problem" with the bank president, Donald Black, because appellant was "unsecured on his notes" (268).

Appellant made out a financial statement, but when he showed it to Frezza, the officer ripped it up saying "[t]his isn't enough" and repeated that appellant had gotten him into a real "jam" (268). Frezza sat down with appellant and began to make out a financial statement with him. (269, 291-293).

Frezza asked appellant how much his house was worth. Appellant said \$28,000 to \$30,000; Frezza claimed the figure wasn't high enough and instructed appellant to put down a real estate value of \$42,000 (269). When appellant wrote in the Bankers Trust unsecured notes in the liability column and asked about the Marine Midland line of credit, Frezza got angry again, told him not to put the former in, and related that the latter was irrelevant since it was a corporate loan (271-272). A third draft of the statement was prepared by Frezza and appellant, showing outstanding notes of only \$11,500 (273). Appellant was aware that the figure was incorrect, and although he questioned what Frezza was asking him to do, he "trusted this guy" (273). Frezza, in turn, denied that he would hurt appellant and his family (273).

Appellant acknowledged writing the "Marine Midland" and 318 William Street entries in the mortgages owned schedule. Appellant argued with Frezza for quite awhile about the 318 William Street

entry, since Frezza, as familiar with this aspect of appellant's finances as with the other crucial details of appellant's business, was well aware that appellant didn't own the property (270, 275-276). With respect to the Maple Grove Avenue lots, appellant stated that his father-in-law had, in effect, given him one of the lots (277).

Appellant stated that he completed the form only to "cover" Dave Frezza; that he had merely put down the information Frezza directed him to include; and that he had no interest, need or ability to secure further loans (280-283, 286, 293, 339). In fact, he had just been given \$40,000 by Frezza at Bankers Trust; he had a \$10,000 account at Bankers Trust before September and he had a \$50,000 line of credit at Marine Midland, a total figure equal to the \$100,000 line of credit he was eventually extended (280, 294).

In October 1974, Frezza and Tom Clark, Frezza's superior, expressed concern over the "unsecured position" of the Bankers Trust account. Accordingly, Bankers Trust lent Puglia an additional \$60,000 with which Puglia paid off the \$50,000 Marine Midland line of credit; Bankers Trust thereby took over the line and was able to obtain a security interest in the autos (285, 303). Appellant continued borrowing on the account until March 1975 (G.X.28). Unfortunately for appellant, the loans occurred during the gasoline crisis of 1974, when the automobile market was at its nadir (283-284). Eventually, the bank required payment on the loan, and appellant was forced to sell his inventory at a tremendous loss (352). In

January 1976 appellant filed for bankruptcy (354), and that September, the instant indictment was filed.

Appellant acknowledged that he did not own the properties at 318 William Street or the American Motors Corporation deposit, and stated that he had given some of this information previously in forms prepared by Frezza and to two other individuals (305, 340-343). Appellant was also confronted with a transcript of an examination before trial dated September 8, 1975, in which, according to the transcript, he had claimed ownership of the American Motors Corporation deposit. Appellant was unable to remember having been asked the questions (313-316). Appellant also denied telling Milton Halpern, an accountant, that he owned \$71,000 worth of real estate, and asserted instead that Frezza had given Halpern that figure "to cover him with Mr. Black over at the Bankers Trust Company" (322). Appellant identified a signed statement containing the \$71,000 figure and the American Motors Corporation deposit as one prepared by Halpern, but claimed that he had not approved the submission by Halpern to Marine Midland Bank or Bankers Trust (325-327) and that it had been done at Frezza's direction to correspond with the other information he had submitted (326-327).

E. The Government's Rebuttal

In rebuttal, the Government recalled David Frezza, who denied directing appellant to falsify information on the financial statement or telling appellant that he was in a jam

(372). Frezza did not deny, however, that he was aware that the information furnished by appellant was incorrect. He also confirmed that he was the individual responsible for writing the Mutual Auto Sales line of credit (see 372). Finally, Frezza restated that the bank does not normally lend \$40,000 prior to receiving a financial statement, precisely what happened here, and did not explain his deviation from this standard of conduct (379).

Donald Black, the President of Bankers Trust, testified that at no time was Frezza's job in jeopardy as a result of the Mutual Auto Sales account (381-382).

William Pearce, Vice President of Marine Midland Bank in charge of commercial loans, identified a statement submitted by appellant to Marine Midland Bank dated June 10, 1974, which was admitted into evidence over defense objection as Government Exhibit 41. That statement, part of the Mutual Auto Sales file of Marine Midland, identifies as an asset of appellant's "Property at 318 William Street in Herkimer, a duplex wood house... as received value \$14,000, insured for \$18,000" (390; G.X.41). Pearce also identified an uncertified financial statement of appellant's dated September 30, 1974, admitted as G.X.42, which lists as an asset the American Motors Corporation deposit (391, 393).

Milton Halpern, an accountant, identified G.X.42 as a statement he had prepared based upon information submitted by appellant (396).

F. Conclusion

Following summations and the court's charge, the jury convicted appellant on count one of the indictment, for the false statement regarding the 318 William Street property, and acquitted on the other two counts.

On March 28, 1977, the district court sentenced appellant to a term of two years' probation. Before sentence was imposed, defense counsel noted that a claim by Bankers Trust in Bankruptcy Court that the loans were non-dischargeable had been dismissed, with the court ruling that Bankers Trust had not relied upon the false information in extending the loans.*

*See sentencing minutes at 3-4. The judgment dismissing the bankruptcy complaint was entered February 17, 1977. See Bankers Trust of New York v. Pugia, N.D.N.Y. Bankruptcy No. 76-BK-167.

ARGUMENT

THE GOVERNMENT FAILED TO PROVE THAT APPELLANT PUGIA SUBMITTED A MATERIALLY FALSE STATEMENT WITH THE INTENT OF INFLUENCING THE BANK TO EXTEND A LOAN.

Both at the close of the Government's case and following the defense and rebuttal, appellant moved for a judgment of acquittal on the ground that the evidence was insufficient to establish his guilt. Without comment, the court denied the motion. On three separate grounds, the court's denial of the motion was incorrect for, taken most favorably to the Government (Glasser v. United States, 315 U.S. 60, 80 (1942)), the evidence fails to show that appellant's statement concerning the 318 William Street property was either false or material, or that it was made with the intent to influence.

A. The Government failed to prove that appellant falsely claimed the property as an asset.

In order for appellant to be convicted of the crime charged, the Government was required to prove appellant's knowing submission of a materially false statement with the intent to influence a loan decision. 18 U.S.C. §1014. The threshold element, of course, was proof that appellant in fact made a false statement. Here, the specific count upon which appellant was convicted by the jury was the charge that he had falsely claimed ownership of property at 318 William Street. The judgment against appellant must be reversed for the simple reason that there is no

claim of such an asset in the financial statement filed with the bank. Rather, the only listing of the William Street property on the financial statement is in the schedule relating not to real property owned, but to "Mortgages Owned." While appellant listed the supposed value of the property in that schedule, his listing of the market value of a property in which, according to the financial statement, he might have owned a mortgage, is not a claim of ownership of the property itself. Moreover, appellant, in the owned-mortgages schedule, did not even claim to own a mortgage on the property; his statement under "Amount of Owned Mortgage" is "none." In sum, with regard to the William Street property, the financial statement presents no claim of either a real estate asset or a mortgage asset. Accordingly, there can be no conviction for falsely stating as an asset the 318 William Street property.

B. The statement, even if false, was not material.

The evidence introduced by the Government fails to prove a second requirement for a conviction under §1014 -- that the information, if false, be materially so. Concededly, to convict under this section, the Government need not have proved that the bank relied upon the false financial statement (United States v. Sabatino, 485 F.2d 540, 544 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974)), a considerable convenience for the Government in this case given the apparent finding by a bankruptcy judge that here there was, in fact, no reliance on the statement. Nevertheless, the cases interpreting §1014 have

consistently required, at the very least, that the alleged false statement be false as to "material respects" (United States v. Sabatino, supra, 485 F.2d at 542), and that the statement be of such a nature that it has the "capacity to influence" the lending institution. United States v. Braverman, 522 F.2d 218, 223 (7th Cir.), cert. denied, 423 U.S. 985 (1975); United States v. Kramer, 500 F.2d 1185, 1187 (10th Cir. 1974); United States v. Goberman, 458 F.2d 226, 229 (3d Cir. 1972); United States v. Simmons, 503 F.2d 831, 835 (5th Cir. 1974); see United States v. Foster, 566 F.2d 1045, 1051 (6th Cir. 1977); United States v. Kreidler, 11 F.Supp. 402 (D.S.D. 1935).

We recognize that in United States v. Cleary, 565 F.2d 43 (2d Cir. 1977), a panel of this Court held that it was not error for a court to fail to instruct the jurors that they must find the statements were false as to a material matter; i.e., "that they had a natural tendency to influence" or were capable of influencing the bank.

However, that result is not necessarily inconsistent with a determination that there is a requirement of materiality in §1014 cases. One of the principal grounds for the decision of the court in Cleary was the fact that, as in perjury and false statement cases, questions of materiality are for the court, not the jury, and that therefore no charge on the issue is required. United States v. Cleary, supra, 565 F.2d at 46. That conclusion, of course, does not dispose of the issue of whether materiality is a requirement in the statute.

In reaching its conclusion in Cleary, the panel also, and

we submit, unnecessarily, expressed the view that the request to charge misstated the law, since "whether or not the Bank was actually induced to rely upon [the statements] is irrelevant." Id. We agree that reliance need not be proved; however, the issue of whether the statement was so immaterial that the information could not have the capacity to influence the bank is, we submit, a different question, and one not disposed of in Cleary.

An interpretation of §1014 which would do away with any materiality requirement would not only place this Circuit in conflict with every other Circuit considering this issue, it would also conflict with cases of this and other Circuits interpreting analogous statutes. See United States v. Pesano, 293 F.2d 229, 232 (2d Cir. 1961) (interpreting 18 U.S.C. §1010, which prohibits the submission of false information for federally insured home loans); United States v. Cooper, 493 F.2d 473 (5th Cir.), cert. denied, 419 U.S. 859 (1974) (interpreting 15 U.S.C. §645, which prohibits, inter alia, submission of false loan applications to the Small Business Administration). Finally, since there is no evidence that Congress intended to protect banks from the submission of false statements which were immaterial, it would, without any showing of Congressional intent, constitute a significant and unwarranted extension of federal criminal jurisdiction. See United States v. Bass, 404 U.S. 336 (1971).

Here, it is simply inconceivable that any supposed misstatement had the capacity to mislead the bank. The salient fact is that this supposedly material asset was not even so

listed, but is included in an unintelligible and unexplained way in the form as an owned mortgage. Frezza never explained why, if it were possible that the bank might rely on a claim of a \$14,000 asset, the bank did not require that it in fact be so listed. Although the very purpose of a record is to preserve an accurate picture of an occurrence so that it may be used by someone other than the person who prepares it, to anyone but Frezza, the listing of the William Street property could not be considered an asset. Accordingly, the decision of the bank not to ask for a new statement indicates that the William Street entry was insignificant and incapable of influencing the loan determination.

Quite apart from the fact that the false entry could not be relied upon, the evidence overwhelmingly shows that the bank not only did not, but could not, have relied upon the entire financial statement itself, for, as Frezza acknowledged, the statement was not an accurate reflection of appellant's financial picture at the time it was completed. Frezza, of course, knew this, and the evidence does not show that the other relevant bank officials were unaware of the situation. Thus, because of Frezza's insistence, never explained, that the statement be backdated to August 13, the statement fails to reflect a \$27,000 personal loan and a \$10,000 corporate loan which appellant personally guaranteed. Frezza's seeming argument that the statement was relevant was completely undermined by his admission that the form understated appellant's liabilities by a figure of \$37,000. The statement was therefore

stale and immaterial.

C. The Government failed to prove that the statements were submitted with the intent to influence the bank.

Finally, for similar reasons, the evidence submitted at trial is insufficient to prove the third element of §1014, that, even if false, the entry concerning the 318 William Street property or the financial statement itself was made with the intent to influence the bank's granting of a loan, i.e., that appellant "intended the bank to take action" as a result of the false statement. United States v. Cleary, supra, 565 F.2d at 46.

We begin with the proposition that, as in most cases involving intent, the Government's proof must rest necessarily on inferences (United States v. Braverman, supra, 522 F.2d at 220) and that precedents are not determinative. Cf. United States v. Lubrano, 529 F.2d 633, 636 (2d Cir. 1975). Here, it is significant that the record contains not only Frezza's account of what occurred, but a credible defense explanation. As Judge Friendly observed in United States v. Frank, 494 F.2d 145, 153 (2d Cir.), cert. denied, 419 U.S. 828 (1974):

[T]he self incrimination clause does not elevate a defendant's silence, much less

the failure to present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version.

Thus, while Frezza's direct testimony, with his claim that he had told appellant the form was necessary, might ordinarily be sufficient to establish appellant's intent to influence (see United States v. Sheehy, 541 F.2d 123, 127 (1st Cir. 1976)), Frezza's statement was undercut by his own actions, acknowledged on cross-examination, by documentary evidence and by a defense case which he chose not to challenge in large part on rebuttal. These facts demonstrate not only that appellant believed the submission of a financial statement itself was unnecessary to the granting of further loans, but that the 318 William Street entry was entirely irrelevant.

First, Frezza's own admissions establish that the submission of the financial statement was unnecessary for the granting of a loan. In fact, appellant, without a financial statement, had acquired prior to September 13, \$50,000 worth of credit at Bankers Trust; significantly, although Frezza was called on rebuttal, he never explained how these loans were written without a financial statement if one were required. Moreover, the documentary evidence shows what appellant claimed, that prior to filling out the financial statement, he had obtained all the credit -- \$100,000 from Marine Midland and Bankers Trust -- he needed and was going to obtain. Accord-

ingly, the extrinsic evidence supports appellant's claim that the financial statement was not submitted to influence a loan decision.

Moreover, appellant did not intend falsely to influence the bank to extend loans because the individual to whom the application was submitted and who had the authority to write the loans was apparently fully familiar with appellant's financial condition. In his direct testimony, Frezza never stated that he believed appellant's claim, if indeed there was one, with respect to the 318 William Street property to be correct. Remarkably, after a defense case which specifically claimed that Frezza was fully familiar with the fact that appellant did not own 318 William Street, Frezza returned for rebuttal and failed to deny appellant's claim. Appellant's un rebutted assertion that the individual who had the authority to approve the loan was familiar with his condition, coupled with the fact that loans had already been approved without the statement, demonstrates that there was no intent to influence. United States v. Kramer, supra, 500 F.2d 1185.

In Kramer, a bank president was accused in aiding and abetting the submission to him of a false financial statement. In finding insufficient evidence of the intent to influence, the court noted that since Kramer had unrestricted authority to make loans,

... a false financial statement could serve no useful or influential purpose. Kramer and the person approving the loan would be one and the same.

Id., 500 F.2d at 1187.

When the Government argued that the form could be used to in-

fluence the board of directors, the court replied:

More important, however, is the fact that the loan was made and its proceeds placed in the bank's escrow account on August 23, 1971. It already had been obtained by the time the board of directors could vote on it. Their subsequent approval of the loan appears to have been little more than a formality.

Id., 500 F.2d at 1188.*

Here, as in Kramer, the primary purpose for submitting the application had been achieved and the statement, if false, was submitted to one with the responsibility of approving the loans and who was fully aware of any falsity. Accordingly, there could be no intent to influence.

Finally, and perhaps most significantly, the completely trivial nature of the misstated asset and the location of the asset on the financial statement negate any intent to influence. Cf. United States v. Dreyfus, 528 F.2d 1064, 1070 (5th Cir. 1976) ("the small size of the error ... could be considered by the jury to determine whether or not the defendant submitted the statement for the purpose of obtaining mortgage insurance.") On the Government's direct case, Frezza acknowledged, and defended as proper, the failure of the statement to include the \$50,000 contingent liability to Marine Midland and almost \$40,000 of recently acquired loans. Appellant could not have

*This latter fact distinguishes both Kramer and this case from United States v. Niro, 338 F.2d 439 (2d Cir. 1964), where this Court held it no defense to a \$1014 prosecution merely that the person to whom the false form is submitted is aware of the false entry. Thus, in Niro, the court assumed that the form was submitted to influence other members of the bank. Here, however, as in Kramer, the primary purpose for which the application was to be submitted had already been achieved.

believed, in light of these omissions which the bank defended, that any statement of a \$14,000 asset could have an effect on the bank's determination. Moreover, appellant must have had this view confirmed by Frezza's failure to require appellant to list the supposed asset as an asset rather than as an owned mortgage.

In sum, appellant's testimony, uncontradicted in its most important aspects, coupled with the documentary evidence, overwhelms the inferences which might otherwise be drawn from Frezza's testimony and ~~compels~~ the conclusion that there was no intent to influence the bank in the submission of the 318 William Street statement. Accordingly, the judgment of the district court must be reversed and the indictment dismissed.

CONCLUSION

For the foregoing reasons, the judgment of the district court must be reversed and the indictment dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

August 7, 1978

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the ~~Southern~~ District of New York. **Northern**

Barry Bassis

